Filed 4/26/06 In re K.R. CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re K.R., a Person Coming Under the Juvenile Court Law.	H029187 (San Benito County Super.Ct.No. JV02-5095)
SAN BENITO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. ALISON R., Defendant and Appellant.	

Alison R. appeals from the order terminating her parental rights to her son K.R. and placing him for adoption. (Welf. & Inst. Code, §§ 366.26, 395.)[1] Mother asserts that the juvenile court committed reversible error by failing to make inquiry regarding the applicability of the Indian Child Welfare Act (ICWA or Act) after being provided with information suggesting that the Act might apply.

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

BACKGROUND

On November 14, 2002, the San Benito County Health and Human Services Agency (Agency) filed an amended petition on behalf of 15-month-old K.R., alleging that he came within the provisions of section 300, subdivision (b) [failure to protect].[2] Facts alleged in support of the petition included that in September, when mother left the child unsupervised, he fell in the family hot tub and nearly drowned, that mother had a substance abuse problem that affected her ability to adequately parent her child, and that mother and the maternal grandmother endangered the child by engaging in verbal and physical altercations in his presence. The child was not detained.

On December 9, 2002, following a contested hearing, the juvenile court took jurisdiction over the child, who was to remain in mother's custody. Mother was ordered to undergo a psychological evaluation. The report prepared for this hearing stated that the ICWA did not apply.

On January 23, 2003, the Agency filed a subsequent petition, pursuant to section 342,[3] after the child was placed in protective custody. The petition alleged continued domestic violence between the mother and the grandmother, with law enforcement being called to their home 11 times over the past few months. The petition also alleged that mother appeared to be suffering from a drug-induced psychosis that affected her ability to parent the child, that she was hearing voices, and that she had driven with the child sitting on her lap.

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[2] The original petition, filed October 16, 2002, had also alleged that K.R. came within the provision of section 300, subdivision (g) [no provision for support/father].

[3] Section 342 provides, in relevant part: "In any case in which a minor has been found to be a person described by Section 300 and the petitioner alleges new facts or circumstances, other than those under which the original petition was sustained, sufficient to state that the minor is a person described in Section 300, the petitioner shall file a subsequent petition . . . ."

At the jurisdiction hearing on March 17, 2003, the court found the allegations of the subsequent petition true. The report of the psychological evaluation of mother had been filed with the court. The psychologist, Dr. Finnberg, opined that mother was suffering from a severe personality disorder, although mother's drug use prevented further evaluation of the potential of a major mental disorder. The psychologist concluded mother had a serious drug problem and recommended residential drug treatment. Mother denied having a drug problem.

A few weeks later, on April 7, 2003, a second subsequent petition was filed, alleging that the child's father was unable to provide regular care for him due to an ongoing substance abuse problem.

On April 21, 2003, a combined jurisdiction/disposition hearing was held. Both parents submitted on the report and the juvenile court adopted the recommended findings and orders, including family reunification services for both parents. Reports prepared by the Agency stated the ICWA did not apply.

At the three-month review hearing on July 14, 2003, services were continued for both parents, although they had made little progress on their case plans. The social worker reported that mother was homeless and continued to have altercations with her mother. She had not followed through with a residential drug treatment program or counseling. Father had not stayed in contact with the Agency and had little interest in the child, visiting only twice in the past three months.

By the six-month review hearing on October 20, 2003, mother had made better progress and was in a residential drug treatment program. The court ordered the child returned to mother's physical custody, with family maintenance services. The court terminated reunification services to father.

Then mother had a relapse and on December 2, 2003, the child was again placed in protective custody. A supplemental petition was filed pursuant to section 387,[4] alleging that the prior disposition had not been effective in protecting the child due to mother's continued substance abuse while in the residential treatment program.[5]

The report prepared for the disposition hearing noted that mother was back in a residential treatment program and had a strong bond with the child. Therefore, further reunification services were recommended with the child continuing in out-of-home placement. At the hearing on December 29, 2003, the juvenile court expressed grave concern over mother's conduct and her ability to control her behavior, but ordered further reunification services.

Over the course of the next several months, mother completed the residential treatment program and was complying with services. The Agency recommended return of the child to her with family maintenance services provided. On April 5, 2004, the court returned the child to mother under a family maintenance plan.

The report prepared in September 2004 for the six-month status review hearing noted mother's struggles with her sobriety and with parenting. Mother did not show up for the scheduled court hearing on October 4, and had not been in contact with her attorney. The hearing was continued to October 18, 2004, but mother again failed to

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[4] Section 387 states, in relevant part: "(a) An order changing or modifying a previous order by removing a child from the physical custody of a parent . . . and directing placement in a foster home, . . . shall be made only after a noticed hearing upon a supplemental petition. [¶] (b) The supplemental petition shall be filed by the social worker in the original matter and shall contain a concise statement of facts sufficient to support the conclusion that the previous disposition has not been effective in the rehabilitation or protection of the child . . . ."

[5] Apparently mother had been "huffing" aerosol fumes to get high while in her residential treatment program.

appear. The social worker informed the court that the Agency had received numerous referrals about mother and that apparently she had absconded with the child.

By the end of October 2004, a second supplemental petition was filed alleging that the previous disposition had not been effective in protecting the child. The child had been located and detained.

A contested jurisdiction hearing was held on January 31, 2005. The juvenile court sustained allegations concerning mother's failure to comply with her case plan and failure to appear in court as ordered. At the contested disposition hearing on March 21, 2005, the court followed the recommendations of the Agency, terminating reunification services to mother and setting a selection and implementation hearing, pursuant to section 366.26.

In the report prepared for the section 366.26 hearing, both the Agency and the State Department of Social Services (who prepared the actual adoption assessment) recommended adoption. Both agencies concluded that the ICWA did not apply. The reports described the child as doing well, with a strong and healthy attachment to his foster parents, with whom he had been placed for a total of 12 months. This family was interested in adopting him.[6]

At the contested selection and implementation hearing on July 18, 2005, attorney Douglas Tsuchiya appeared, stating that he had recently been retained by the maternal grandmother, Nancy O., and that he was contemplating filing a motion to intervene on behalf of the grandmother. He stated that he needed first to discuss several issues with her, including the ICWA. The juvenile court allowed Mr. Tsuchiya to remain in the

[6] The maternal grandmother, Nancy O., apparently wanted to be considered as an adoptive placement for the child when it became evident that mother's parental rights would be terminated. But the maternal grandmother had been involved in domestic violence with mother, one of the reasons for the dependency. Moreover, when the report was prepared for the July 2005 hearing, the maternal grandmother herself had been clean and sober for only 45 days.

courtroom, even though his client was not a party to the proceeding. The hearing proceeded with testimony from the social worker. The court then terminated parental rights and ordered adoption as the permanent plan for the child. Mother timely appeals.

DISCUSSION

On appeal, mother contends that the juvenile court committed reversible error by failing to make any inquiry regarding the applicability of the ICWA after being provided with information suggesting that the Act might apply.

Factual Background

At the section 366.26 hearing, the social worker brought to the court's attention the fact that an additional attorney was present in the courtroom, appearing on behalf of a grandparent. The attorney, Douglas Tsuchiya, stated that he was retained one court day before (the preceding Friday) to represent the maternal grandmother, Nancy O. Mr. Tsuchiya stated: "I understood this was a contested [366.]26 hearing, and I understand the issue is fairly limited at this point of the proceedings. [¶] But Miss O[.] did retain me, and there are some issues that we need to discuss with her and I appreciate the court giving me an opportunity to speak. There might be some issues with respect to the Indian Child Welfare Act. There's a preferential treatment pursuant to a relative request, and also a relationship that bears more on the issues in a [366.]26 hearing between the minor K.R. and Nancy O[.] [¶] It's my understanding that they do have a relationship which might affect one of the factors of the criteria for adoptability. I don't think she is a party at this point. There is a question as to that in my mind and I will—I'm here to basically advise the court and let the parties know that I have been retained—I'm contemplating filing a motion in the near future with respect to—in the nature of a Motion to Intervene on behalf of the maternal grandmother."

The public defender, representing mother, stated he had no objection to continuing the hearing to allow counsel to file a motion to intervene, but county counsel objected to any further continuance in the case and the court agreed. The court allowed Mr.

Tsuchiya to remain in the courtroom during the hearing, with any motions to be filed later.

Analysis

Mother asserts that counsel's remark—"There might be some issues with respect to the Indian Child Welfare Act"—was enough to suggest Indian heritage for the child such that the full panoply of notice procedures under the ICWA was triggered. She maintains that the juvenile court should have continued the hearing and ordered further investigation of Indian heritage so that notice could be given to possible tribes. She further maintains that the juvenile court erred in making no specific finding as to whether the ICWA applied and in failing to order the parents to complete the new Judicial Council form on *Parental Notification of Indian Status*. We disagree with mother's claims.

"The ICWA is designed to protect the interests of Indian children, and to promote the stability and security of Indian tribes and families. It sets forth the manner in which a tribe may obtain jurisdiction over proceedings involving the custody of an Indian child, and the manner in which a tribe may intervene in state court proceedings involving child custody." (*In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 906.) For purposes of the ICWA, an Indian child is defined as an unmarried person under the age of 18 who is: (1) a member of an Indian tribe; or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4); Cal. Rules of Court, rule 1439(a)(1)(A) & (B).)

In order to ascertain tribal membership or eligibility, the social services agency is required to send appropriate notice. "Under the ICWA, where a state court 'knows or has reason to know' that an Indian child is involved, statutorily prescribed notice must be given to any tribe with which the child has, or is eligible to have, an affiliation. (25 U.S.C. § 1912(a).) The court and the social services agency have 'an affirmative duty to inquire whether a child for whom a petition under section 300 is to be, or has been, filed

is or may be an Indian child.' [Citation.]" (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1264.) Because the determination of a child's Indian status is a matter for the tribe, "the juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement. [Citations.] Both the court and the county welfare department have an affirmative duty to inquire whether a dependent child is or may be an Indian child. [Citation.]" (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.)

This duty is set forth in more detail in the California Rules of Court, rule 1439 (hereafter rule 1439). Rule 1439(d) provides that "The court, the county welfare department, and the probation department have an affirmative and continuing duty to inquire whether a child for whom a petition under section 300 . . . is to be, or has been, filed is or may be an Indian child. [¶] . . . [¶] (2) In dependency cases, the social worker must ask the child, if the child is old enough, and the parents or legal guardians whether the child may be an Indian child or may have Indian ancestors." Since January 2005, the parent or guardian must be ordered to complete a Judicial Council form, entitled "*Parental Notification of Indian Status*." (Rule 1439(d)(3).)

Rule 1439(d)(4) further provides: "The circumstances that may provide probable cause for the court to believe the child is an Indian child include, but are not limited to, the following: [¶] (A) A person having an interest in the child, including the child, an Indian tribe, an Indian organization, an officer of the court, or a public or private agency, informs the court or the county welfare agency . . . or provides information suggesting that the child is an Indian child; [¶] (B) The residence of the child, the child's parents, or an Indian custodian is in a predominantly Indian community; or [¶] (C) The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the Indian Health Service." This listing of circumstances causing a juvenile court to have reason to believe a child is an Indian child closely parallels the federal Guidelines. (See Guidelines for State Courts;

Indian Child Custody Proceedings 44 Fed.Reg. 67584, 67586 (Nov. 26, 1979); see also *In re O.K.* (2003) 106 Cal.App.4th 152, 156.)

Other directions are provided in the state Child Welfare Services Manual of Policies and Procedures, sections 31-515 and 31-520 (CWS Manual) as quoted in the case of *In re S.B.* (2005) 130 Cal.App.4th 1148, 1157-1158. According to these directions, in order make a determination as to whether a child is or may be an Indian child as defined by the ICWA, "the social worker shall ask the child, his parent or custodian whether the child is or may be a member of an Indian tribe, or whether the child identifies himself/herself as a member of a particular Indian organization." (CWS Manual, § 31-515.111.)

Here, all of the various reports written throughout the course of these extended proceedings specifically stated, under the heading "INDIAN CHILD WELFARE ACT STATUS," "The Indian Child Welfare Act does not apply." In addition, the record reflects that neither the petition nor the supplemental petitions had any box checked on the form to indicate possible Indian heritage. We agree with the statement by the reviewing court in *In re S.B.*, "From the affirmative representation that the ICWA did not apply, it is fairly inferable that the social worker did make the necessary inquiry." (*In re S.B., supra,* 130 Cal.App.4th at p. 1161; see also *In re Aaliyah G.* (2003) 109 Cal.App.4th 939, 942.)

But mother maintains that the juvenile court had a further duty of inquiry after Mr. Tsuchiya's statement. Mother claims that this statement raised a suggestion that the child was an Indian child. We disagree. When the statement is read in context, it does not reflect an offer of information that the child had Indian heritage nor was it a suggestion that the child might be an Indian child. Rather, it was a comment that the attorney intended to discuss certain dependency issues with his new client.

The grandmother herself was not a party to these proceedings. (See *In re O.K., supra,* 106 Cal.App.4th at p. 156.) "[N]either the Guidelines nor rule 1439(d)(2)

expressly include relatives as a source of information that would give the court reason to believe that a minor is an Indian child." (*Id.* at p. 157.) In the case of *In re O.K.*, at the section 366.26 hearing, the court asked the question as to whether there was any parent enrolled or eligible for enrollment in a tribe, after the agency's general notice to the Bureau of Indian Affairs was returned for insufficient identifying tribal information. The paternal grandmother replied that "the young man may have Indian in him," a statement she based on her family's geographical roots. (*Id.* at p. 155.) The reviewing court dismissed the parents' claim of error and concluded that the information "was too vague and speculative to give the juvenile court any reason to believe the minors might be Indian children." (*Id.* at p. 157.) It is true, as mother notes, that some ICWA notice had been given in this case, but we find the reviewing court's conclusion helpful in the present case.

Another case in which the court considered the level of information required to trigger the necessity for further ICWA investigation is *In re Aaron R.* (2005) 130 Cal.App.4th 697. There, the agency reports stated repeatedly that the ICWA did not apply. At the end of the permanency planning hearing, the grandmother stated to the court that she was a member of the Black Native American Association in Fort Point Presidio Historical Association. The mother claimed that this statement was enough to trigger an obligation of the court for further inquiry as to the child's eligibility for tribal membership. The reviewing court concluded: "We consider that the grandmother's brief allusion to her own membership in an historical association falls far short of giving the court reason to know that Aaron may be an Indian child. The historical association was not itself a tribe, and the record contains no information regarding its requirements of membership. We find that the case comes directly under the precedent of *In re O.K.*[, *supra,*] 106 Cal.App.4th 152. There, the paternal grandmother stated at the section 366.26 hearing that ' "the young man may have Indian in him." ' [Citation.] After a careful review of the circumstances that may give a juvenile court reason to believe that a

child is an Indian child, the court held that the grandmother's statement 'was too vague and speculative to give the juvenile court any reason to believe the minors might be Indian children.' [Citation.] [¶] We hold that the court had no obligation to make a further or additional inquiry in the absence of any evidence supporting a reasonable inference that the child might have Indian heritage. [Citation.]" (*Id.* at pp. 707-708.)

Mother is correct that courts in numerous cases have concluded that a juvenile court needs only a suggestion of Indian ancestry to trigger the ICWA notice requirement. But the cases she cites are readily distinguishable from the present case because they concern situations where one or both parents informed the social workers that they or their relatives had some Native American heritage, whether they could name a specific tribe or not. (See, e.g., *In re I.G.* (2005) 133 Cal.App.4th 1246 [mother told social worker she was part Native American]; *In re Merrick V.* (2004) 122 Cal.App.4th 235 [mother informed social worker she had American Indian heritage, specifically the Yaqui tribe]; *In re Miguel E.* (2004) 120 Cal.App.4th 521 [parents stated possible American Indian heritage for father; statement in report]; *In re Nikki R.*, *supra*, 106 Cal.App.4th 844 [mother stated at detention hearing that father had Cherokee heritage]; *In re Antoinette S.* (2002) 104 Cal.App.4th 1401 [father said grandparents had Native American ancestry]; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247 [parents told agency they had Cherokee heritage]; *In re Samuel P., supra,* 99 Cal.App.4th 1259 [agency had information that mother was American Indian and that her relatives had tribal affiliations].)

Mother further maintains that the juvenile court was required to make an ICWA finding. She cites the case of *In re Jonathon S.* (2005) 129 Cal.App.4th 334, as authority for reversible trial court error in failing to make a specific ICWA finding. But in that case the jurisdiction/disposition report noted that the father stated he had Blackfoot Indian heritage but was not a part of a tribe. The reviewing court concluded the agency was required to send appropriate ICWA notice and the juvenile court was required to

make an ICWA finding. The record before us contains no specific information from the parents concerning Indian heritage. We find no error in the juvenile court's failure to make a specific ICWA finding.

In the present case, an attorney, retained by the grandmother who had no standing in the case, made a comment indicating a need to discuss the ICWA with his client. We cannot find this comment to be a suggestion of Indian ancestry such that the juvenile court was obligated to pursue further inquiry or to ensure compliance with the ICWA notification.[7]

DISPOSITION

The order appealed from is affirmed.

Duffy, J.

WE CONCUR:

Mihara, Acting, P.J.

McAdams, J.

[7] As to mother's specific complaint that she should have been required to complete the form on *Parental Notification of Indian Status* (JV-130), jurisdiction was taken over her child in 2002, and the form was not required by the rules of court until January 2005. (See rule 1439(d)(3).)